UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. **Case No. 6:10-cv-1783-Orl-35KRS**

GREAT AMERICAN FINANCIAL RESOURCES, INC.,

Defendant.
_____/

ORDER

THIS CAUSE comes before the Court upon the parties' Joint Motion to Enter Consent Decree (Dkt. 9). Upon review of the relevant filings and case law and being otherwise fully advised, the Court **DENIES** the parties' Motion **without prejudice**.

I. BACKGROUND

On December 1, 2010, Plaintiff filed a Complaint in this Court pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607. (Dkt. 1 at ¶ 1.) The Complaint states that Plaintiff seeks: (1) reimbursement of costs incurred and to be incurred by the Environmental Protection Agency ("EPA") for response actions related the Sprague Electric Company Superfund Alternative Site ("Site"), together with accrued interest; and (2) the performance of response work by Defendant at the Site, consistent with the National Contingency Plan, 40 C.F.R. Part 300. (Dkt. 1 at ¶ 2.) The Complaint alleges that the Defendant, Great American Financial Resources, Inc. ("GAFRI"), is the legal

successor to Sprague Electric Company ("Sprague") and the current owner of the Site. (Dkt. 1 at ¶¶ 7, 8.)

According to the Complaint, Sprague employed solvents containing trichloroethylene ("TCE") and trichloroethane ("TCA") as part of its manufacturing process, which led to the "release" and "threatened release" of these "hazardous substances" at the Site. (Dkt. 1 at ¶¶ 13-14 (citing CERCLA definitions set forth in 42 U.S.C. § 9601(22) and (14.))) The Complaint states that EPA has designated a portion of the Site as Operable Unit One ("OU1") for the purposes of the remedial work currently planned for the Site. (Dkt. 1 at ¶ 17.) Plaintiff asserts that GAFRI, as legal owner of the Site and legal successor to Sprague, is jointly and severally liable under CERCLA for response costs incurred by the United States in connection with OU1 of the Site. (Dkt. 1 at ¶¶ 19, 20, 21.) Plaintiff further contends that GAFRI is liable to the United States for injunctive relief to abate and remedy the imminent and substantial endangerment to the public health or welfare or the environment presented by OU1 of the Site. (Dkt. 1 at ¶¶ 22.)

The parties filed a Notice of Lodging of Proposed Consent Decree Pending Solicitation of Public Comment, along with an attached proposed Consent Decree signed by parties to this action, on December 1, 2010. (Dkt.2; Dkt. 2-1 at 46-48.) The parties filed a Joint Motion to Enter Consent Decree on January 28, 2011. (Dkt. 9.) Under the proposed Consent Decree, GAFRI will (1) pay the United States for all of its past and future incurred costs relating to response actions taken in connection with OU1 of the Site, together with accrued interest; and (2) perform remedial design and the

remedial action for OU1 of the Site in a manner consistent with the National Contingency Plan, 40 C.F.R. part 300. (Dkt. 2-1 at 3-4.)

II. LEGAL STANDARD

Congress enacted CERCLA in 1980 in response to the serious environmental and health risks posed by industrial pollution. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874 (2009). The Act was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination. Id. It is the policy of CERCLA to encourage settlements, particularly in cases where a government actor committed to the protection of the public interest has worked on the construction of the proposed settlement. United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990).

A court reviewing a proposed consent decree under CERCLA must assure that it is fair, reasonable, and consistent with the purpose the CERCLA is intended to serve. United States v. Bay Area Battery, 895 F. Supp. 1524, 1528 (N.D. Fla. 1995) (quoting Cannons, 899 F.2d at 85); see also United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1049 (N.D. Ind. 2001). Although a reviewing court does not serve simply as a rubber stamp that automatically approves all proposed CERCLA settlements, it should give deference to the EPA's determination that a settlement is appropriate where sufficient facts and reasons establish that approval is warranted. United States v. Brook Village Associates, No. Civ.A. 05-195, 2006 WL 3227769, at *1 (D.R.I. Nov. 6, 2006); see also Cannons, 899 F.2d at 85 (discussing the need for deference and respect for EPA settlement determinations).

III. DISCUSSION

The Court finds that the proposed consent decree in this matter was reached in a procedurally fair manner. Pursuant to CERCLA, EPA appears to have conducted an investigation of the site and contacted relevant governmental bodies, including the State of Florida as well the United States Department of the Interior and the National Oceanic and Atmospheric Administration, to notify those parties of its negotiations with the settling Defendant. (Dkt. 2-1 at 3.) EPA also prepared a Record of Decision summarizing the five alternatives for remedial actions available at OU1 and setting forth the reasoning for selecting its preferred alternative – In Situ Chemical Oxidation with Soil Vapor Extraction. (Dkt. 1-2 at 49-59.)

EPA held a public meeting to discuss the proposed cleanup plan with members of the public. (Dkt. 1-3.) The Court notes that the proposed consent decree was also submitted to the public for comment, and no member of the public responded with any comments in opposition to the entry of the proposed consent decree. (Dkt. 9-1 at 1.) Nor has any party moved to intervene in this action. Finally, the parties inform the Court that the consent decree is the product of extensive arms length negotiation involving experienced counsel on both sides. (Dkt. 9-1 at 2.) Based on the submissions of the parties and the documents in the record, the Court finds that the consent decree is procedurally fair.

Notwithstanding the procedural fairness of the proposed consent decree, the Court finds several of its substantive provisions problematic and declines to approve it. First, although the consent decree purportedly aims to "resolve the claims of Plaintiff against Settling Defendant relating to OU1" (Dkt. 2-1 at ¶ 5), it contains a provision that

requires the Defendant to waive *res judiciata* and other defenses. Paragraph 97 of the consent decree states as follows:

> In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief related to OU1, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants by Plaintiff).

(Dkt. 2-1 at ¶ 97.) These provisions, if approved, would have the effect of barring the Defendant from relying on the consent decree as a defense to preclude "any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief related to OU1." (Dkt. 2-1 at ¶ 97.)

Paragraph 97 does state that the waiver of *res judicata* and other defenses does not affect "the enforceability of the covenants not to sue set forth in Section XXI." (Dkt. 2-1 at ¶ 97.) Yet, Paragraph 83 in the covenants not to sue contains an expansive General Reservation of Rights in which the United States reserves the right to pursue a variety of claims against this Defendant, including:

a. claims based on a failure by Settling Defendant to meet a requirement of this Consent Decree;

b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of OU1;

c. liability based on the ownership or operation of the Site by Settling Defendant when such ownership or operation commences after signature of this Consent Decree;

d. liability based on Settling Defendant's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with OU1, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. criminal liability;

g. liability for violations of federal or state law which occur during or after implementation of the Work; and

h. liability, prior to achievement of Performance Standards in accordance with Paragraph 13, for additional response actions that EPA determines are necessary to achieve and maintain Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, but that cannot be required pursuant to Paragraph 14 (Modification of SOW or Related Work Plans);

i. liability for additional operable units at the Site or the final response action; and

j. liability for costs that the United States will incur regarding the Site but which are not within the definition of Future Response Costs.

(Dkt. 2-1 at ¶ 83.)

The Court finds that several of these provisions are subject to such broad construction that their inclusion severely undercuts any degree of repose that would otherwise flow from the covenants not to sue. The terms of the consent decree would, for instance, permit the United States at any point to revisit the agreement and seek to recover additional costs arising from "liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments." This provision is not bounded in scope or time, and any environmental degradation, however minor, could trigger liability for "injury to, destruction of, or loss of

natural resources," regardless of whether the parties had agreed to resolve such claims through the consent decree. When the United States reserves its rights to pursue claims against the Defendant in such sweeping terms, and the Defendant waives the right to interpose *res judicata* and related defenses, it is not clear what degree of finality, if any, the consent decree confers upon the Defendant.

The Court is aware that two parties to a settlement may reach an agreement amongst themselves that allows for the waiver of *res judicata* and permits claim splitting. See generally Arrow Gear Co. v. Downers Grove Sanitary Dist., 629 F.3d 633, 638 (7th Cir. 2010). In Arrow, the plaintiffs brought a contribution action pursuant to CERCLA to shift some of the costs imposed on them by EPA to the defendants. The district court barred the action based on *res judicata* because the parties had reached a settlement in a prior action, which had been dismissed with prejudice. Under that settlement agreement, the parties to the agreement released other settling parties from "any claims for contribution by any defendant against any other defendant" that could have been made "from the beginning of time." Arrow, F.3d at 635. However, that provision was qualified by a subsequent provision that reserved the right to sue on matters "that may arise in other contexts related to alleged contamination at [the site]." Id.

The Seventh Circuit rejected the argument that *res judicata* barred the action, finding that the reservation of the right to sue amounted to a waiver of *res judicata*. The Seventh Circuit reasoned that "*[r]es judicata* is a defense. It can be forfeited if not pleaded – so it can be waived expressly." Id. at 638. The Seventh Circuit also noted

that the "interposition of an agreement to split claims" is a "commonplace" response to a claim of *res judicata*. Id.

Unlike Arrow, however, the parties here are not seeking enforcement of a private settlement agreement. Instead, they are asking the Court to lend its imprimatur to the proposed consent decree. The lack of finality that would otherwise accompany a CERCLA settlement detracts from its substantive fairness because it deprives the Defendant of an "inherent benefit" of settling a claim brought by the United States. See United States v. Atl. Research Corp., 551 U.S. 128, 141 (2007) (recognizing that settlement under 42 U.S.C. § 9613(f)(2) involves the "inherent benefit of finally resolving liability as to the United States or a State").

In addition, the absence of a final resolution of the Defendant's liability also impacts the Court's ability to approve the language of Paragraph 94, which provides that "by entering this Consent Decree this Court finds . . . that Settling Defendant is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, or as may be otherwise provided by law, for 'matters addressed' in this Consent Decree." (Dkt. 2-1 at ¶ 94.) The referenced section of CERCLA, Section 113(f)(2), 42 U.S.C. § 9613(f)(2), states that a person "*who has resolved its liability* to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." 42 U.S.C. § 9613(f)(2) (emphasis added). Thus, finding that the Defendant qualifies for protection from contribution suits under Section 112(f)(2) necessarily involves a finding that the Defendant has "resolved its liability to the United States." The Court cannot make such a finding under the proposed consent decree.

Either the Defendant remains liable for third party contribution claims because its liability is not finally resolved, in which case it has hardly received the bargained for benefit; or it is absolved from liability without the required showing of finality, which appears to be precluded by the language of the statute. This inconsistency is not addressed by the proposed settlement.

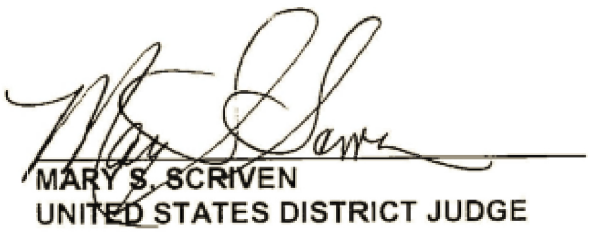
Approving the proposed consent decree also raises the prospect of additional litigation. If, for instance, the Government exercised its right under the consent decree to recover additional costs from the Defendant for matters GAFRI considered resolved by the settlement, such a dispute would likely require additional adjudication. Alternatively, a third party seeking to bring a contribution claim against this Defendant might attempt to attack the consent decree as improperly issued in light of the absence of a resolution of the Defendant's liability. Such litigation could be avoided through a consent decree that does not include the waiver of *res judicata* and related defenses set forth in Paragraph 97.

There are three other concerns regarding the consent decree that the Court must briefly address. First, the Court has no basis for making any findings regarding the factual underpinnings of this matter. Thus, any recitation of relevant facts in the Background section will be established by the stipulation of the parties not by factual findings of the Court. With respect to Paragraph 67(c) of the consent decree, any "schedule" contained in a motion for judicial review that purports to set a timeline for the resolution of a dispute shall be advisory in nature and shall not have the effect of binding this Court to adjudicate that dispute by a date certain. Finally, notwithstanding

any language in the consent decree, any judicial determination shall be governed under the standard of review provided by applicable principles of law.

In light of the foregoing concerns, the Court is compelled to **DENY** the parties' Joint Motion to Enter Consent Decree **without prejudice**. Upon proper motion, the Court will reconsider a revised proposed consent decree that addresses the concerns raised in this Order. If the parties request a hearing to address the Court's concerns, they shall file a joint motion seeking such relief. Such a hearing may be held telephonically, if necessary.

DONE and **ORDERED** in Orlando, Florida, this 12th day of September 2011.



MARY S. SCRIVEN
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record